

BEFORE THE DEPARTMENT OF NATURAL
RESOURCES AND CONSERVATION
STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO. 51353-S410 BY CRUMPLED HORN)

* * * * *

An Oral Argument Hearing was held before the Assistant Administrator of the Water Resources Division on Wednesday, January 7, 1987, at the Teton County Courthouse in Choteau, Montana.

The Applicant Crumpled Horn presented exceptions to the Proposal for Decision in this matter entered April 21, 1986. Other parties participating in the Oral Arguments were attorney Charles Joslyn for Elizabeth Hawley, Curt Dyer for Brady Irrigation Co., and attorney Lyle Manley for the Montana Department of State Lands (DSL). The DNRC has considered the exceptions, and responds to them as follows.

The Proposal for Decision recommended denial of Application for Beneficial Water Use Permit No. 51353-S410. The reason for denial was that the Hearing Examiner found the Applicant failed to meet its burden to prove by substantial credible evidence that 1) there are unappropriated waters in the source of supply, and 2) the water rights of prior appropriators will not be adversely affected. Conclusions of Law 9 and 10, Proposal at p. 20-21. See § 85-2-311(1)(a) and (b), MCA.

On May 5, 1986, Crumpled Horn filed a written request for oral argument. The request stated, in pertinent part:

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Crumpled Horn does not feel that the evidence presented proves that prior appropriators will be adversely affected or that the appropriation will cut off stockwater for prior appropriators. Additionally, the hearing was held at the peak of a drought condition when Muddy Creek was at its lowest flow in years, and the decision does not reflect the flow that normally occurs in years of adequate rainfall or surplus. The DNRC has ignored the case of Mettler v. Ames Realty Co..

Before proceeding to the substance of Crumpled Horn's arguments, a procedural matter needs to be addressed. At the oral argument hearing, counsel for DSL moved that this Department strike all portions of the Applicant's oral argument that did not pertain to the issues raised in the Applicant's written request for oral argument. As the basis for its motion, the DSL cites ARM 36.12.229(1), which provides:

Any party adversely affected by the hearing examiner's proposal for decision may file exceptions. Such exceptions shall be filed with the hearing examiner within 20 days after the proposal is served upon the party. A written request for additional time to file exceptions may, in the discretion of the hearing examiner, be granted upon a showing of good cause. Exceptions must specifically set forth the precise portions of the proposed decision to which the exception is taken, the reason for the exception, authorities upon which the party relies, and specific citations to the transcript or [sic] if one was prepared. Parties are cautioned that vague assertions as to what the record shows or does not show without citation to the precise portion of the record (e.g., to exhibits or to a transcript, if one was prepared) may be accorded little attention.

(emphasis added).

We have denied DSL's motion to strike for the following reasons. First, by its own terms § 36.12.229(1) does not provide that written exceptions shall delimit the scope of oral

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argument. The rule merely cautions parties that vague exceptions will have little influence on the Department's final decision. Second, the purpose of the requirement that exceptions be specific is not to avoid surprising other parties at the oral argument hearing. Under the present rule, written exceptions do not serve as notice to other parties, since the rule does not require that exceptions be served on other parties. Instead, the purpose of written exceptions is to notify the Department of a party's disagreement with a Proposal for Decision. Moreover, the requirement of specificity in exceptions primarily serves to allow the Department to respond to the exceptions when no oral argument is requested. It follows that written exceptions can be less specific when a party can explain his or her position at oral argument. Thus, under present procedures, there is no requirement that oral argument be limited to matters raised in written exceptions. DSL's motion to strike is therefore denied.

Crumpled Horn's first exception to the Proposal for Decision is that the evidence did not "prove" that prior appropriators would be adversely affected. This argument overlooks the critical point that the burden of proof in applications for permits and for changes is on the applicant. As stated in § 85-2-311(1):

Except as provided in subsection (2) through (4), the department shall issue a permit if the applicant proves by substantial credible evidence that the following criteria are met:

- (a) there are unappropriated waters in the source of supply:

...

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(b) the water rights of a prior appropriator will not be adversely affected;

...

(emphasis added).

In this case, it was Crumpled Horn's burden to prove that prior appropriators would not be adversely affected, and that there are unappropriated waters in Muddy Creek.

In Conclusion of Law 10, the Hearing Examiner found that Crumpled Horn failed to meet its burden to prove that there are unappropriated waters in the source. Proposal at pp. 20-22. The Applicant's testimony pertaining to this issue was somewhat sparse. In sum, the Applicant testified that there was water continuously leaking into Muddy Creek from the Brady Irrigation Co. diversion; that the Company had never tried to stop the waste; and that, in dry years, the leakage did not help downstream appropriators because it seeped into the streambed a short distance below the Company diversion. Finding of Fact 6, Proposal at p. 10. On the other hand, two objectors testified that they used the Company leakage for stockwatering. Findings of Fact 14 and 17, Proposal pp. 13 and 15. Another objector testified that, although the leakage seeped into the streambed in dry years, it helped to keep the riverbed "charged", and in fact might reappear downstream. Finding of Fact 15, Proposal at p. 14.

These facts support the Hearing Examiner's finding that the Applicant failed to meet its burden on the issue of unappropriated water. Merely showing that the Brady leakage

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seeped into the streambed does not establish that others have no right to the water's use. Moreover, Crumpled Horn did not rebut the testimony of the objector who claimed to use the leakage before it seeped into the streambed. The objectors' testimony made a plausible showing that the water was already appropriated. Crumpled Horn simply failed to prove that this was not the case.

Admittedly, it is difficult to prove that water seeping into a streambed does not reach other users. This is presumably the point of Crumpled Horn's argument that the hearing was held at the "peak of a drought condition" and that the Proposal "does not reflect the flow that normally occurs in years of adequate rainfall or surplus". Nevertheless, the timing of the hearing in no way limited the Applicant's case. Crumpled Horn was free to present evidence about normal flows or surplus water, but did not do so. We recognize that measurements of historic flow are not available, and that the burden of scarce or non-existent data tends to fall on the Applicant in these matters. But that presumably was the intent of the legislature in drafting the Water Use Act. It was Crumpled Horn's statutory burden to show that there was water available. Absent a substantial, credible showing of this fact, the Application must be denied. In Conclusion of Law 9, the Hearing Examiner found that Crumpled Horn failed to meet its burden to prove that prior appropriators would not be adversely affected. Proposal at p. 20. The facts supporting this finding were the same as those for Conclusion 10. For the reasons discussed above, the facts also support Conclusion of Law 9.

Crumpled Horn presents two arguments to the effect that the Hearing Examiner should have ruled for Crumpled Horn as a matter of law. First, Crumpled Horn argues that, when stream water goes underground, it is by definition no longer a part of the stream, and can not be claimed by prior appropriators. Crumpled Horn presented no legal authority for this proposition. Indeed, Montana law is to the contrary, holding that seepage water along a stream belongs to the stream and its appropriators. Woodward v. Perkins, 116 Mont. 46 (1944).

Second, Crumpled Horn argues that Mettler v. Ames Realty Co., 61 Mont. 152, 201 P. 702 (1921) precludes the stockwater users in this case from asserting their rights against Crumpled Horn's irrigation proposal. However, as discussed in the Final Order to Application for Change of Appropriation Water Right No. G40605-410, Crumpled Horn misconstrues Mettler. Mettler precluded a stockwater user from asserting a riparian right against an irrigation appropriator. 61 Mont. at p. 170-171. Here, the stockwater rights are appropriative, and thus were properly considered by the Hearing Examiner under § 85-2-331(1)(b), MCA.

Crumpled Horn also has requested that this matter be reheard, citing the confusion caused by this hearing following that for the Application for Change of Appropriation Water Right No. G40605-410. The point and means of diversion in the two matters were similar, but we are not persuaded that this caused any significant confusion. Scheduling of hearings is a matter

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within the Hearing Examiner's discretion, and the Department will not overrule the Examiner in this area without a showing that she abused her discretion. ARM 36.12.203(2)(a).

Crumpled Horn's final three arguments are: 1) it was error to rule that Ph.D dissertations offered as evidence by Crumpled Horn were inadmissible hearsay; 2) Brady Irrigation Co. is legally prohibited from recapturing its leakage into Muddy Creek; 3) evidence from the on-site inspection should have been considered to rebut an objector's claim that his cattle watered along the entire length of Muddy Creek in this section.

None of these arguments is relevant here because, even if we accept the arguments and find error, it would not affect the grounds for the recommended result. Accordingly, no purpose would be served by addressing these arguments at this time.

All the Findings of Fact and Conclusions of Law of the Hearing Examiner in this matter are adopted and incorporated in this Order by reference. Based upon the Findings and Conclusions, all files and records herein, and the Department's Response to the Exceptions, the Department of Natural Resources and Conservation makes the following:

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ORDER

Application for Beneficial Water Use Permit No. 51353-S410
by Crumpled Horn is hereby denied.

DATED this 15th day of October, 1987.



LAURENCE SIROKY
Assistant Administrator
Water Resources Division
Department of Natural Resources
and Conservation
1520 East Sixth Avenue
Helena, MT 59620-2301

NOTICE

The Department's Final Order may be appealed in accordance
with § 2-4-702 of the Montana Administrative Procedure Act by
filing a petition in the appropriate court within thirty (30)
days after service of the Final Order.

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AFFIDAVIT OF SERVICE
MAILING

STATE OF MONTANA)
) ss.
COUNTY OF LEWIS & CLARK)

Susan Howard, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on October 15, 1987, she deposited in the United States mail, first class postage prepaid, a FINAL ORDER by the Department in the Matter of the Application for Beneficial Water Use Permit No. 51353-S410, by Crumpled Horn, addressed to each of the following persons or agencies:

Crumpled Horn
Route 2
Choteau, MT 59422

Lyle Manley, Attorney
MT Board of Commissioners
Capital Station
Helena, MT 59620

Danny L. Weist
Route 2, Box 176
Choteau, MT 59422

Ronald W. Otness
Lyle E. Otness
P O Box 726
Choteau, MT 59422

Brady Irrigation Co.
c/o Gordon Schlepp
P O Box 207
Brady, MT 59416

Teton Water Users Association
P O Box 222
Carter, MT 59420

Allen L. & Terri L. Denzer
P O Box 936
Conrad, MT 59425

Danreuther Ranches
Charles & Janet Danreuther
Loma, MT 59460

Lyman R. & Darlene A. Denzer
P O Box 937
Conrad, MT 59425

Depner Farms
Route 2, Box 135
Choteau, MT 59422

Bob Larson, Manager
Water Right Bureau Field Office
P O Box 1828
Havre, MT 59501
(inter-departmental mail)

Gumbo, Inc.
Roger J. Weist
Route 2, Box 175
Choteau, MT 59422

James Madden, Legal Counsel
DNRC
1520 East Sixth Avenue
Helena, MT 59620-2301
(hand delivered)

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Elizabeth Hawley
c/o Charles Joslyn
Attorney at Law
Choteau, MT 59422

Faye McKnight, Legal Counsel
DNRC
1520 East Sixth Avenue
Helena, MT 59620-2301
(hand delivered)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by

Susan Howard

STATE OF MONTANA)
) ss.
COUNTY OF LEWIS & CLARK)

On this 15th day of October, 1987, before me, a Notary Public in and for said state, personally appeared Susan Howard, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Greg J. Van Vorst
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires October 17th, 1989

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BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 51353-s410 BY CRUMPLED HORN)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on June 12, 1985, in Choteau, Montana.

Crumpled Horn, the Applicant in this matter, was represented by David Chalmers, Secretary-Treasurer of Crumpled Horn.

Objector State of Montana Department of State Lands appeared by and through counsel Lyle Manley. Ron Roman appeared as a witness for the Objector.

Objector Depner Farms, Inc. was represented by Ross Depner, Secretary for Depner Farms.

Objector Danny L. Weist appeared personally.

Objector Darlene Denzer appeared personally, and as representative for Lyman Denzer.

Objector Elizabeth Hawley appeared personally.

Objector Teton Water Users Association was represented by William Reichelt, President of the Teton Water Users Association.

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Bob Larson, Field Manager of the Havre Water Rights Bureau Field Office, and Marvin Cross, Engineering Analyst with the Havre Field Office, appeared as staff witnesses for the Department of Natural Resources and Conservation (hereafter, the "Department").

STATEMENT OF THE CASE

On September 30, 1983, the Applicant filed Application for Beneficial Water Use Permit No. 51353-s410, requesting 2,520 gallons per minute ("gpm") up to 950 acre-feet per year for new sprinkler irrigation of 360 acres. The source is Muddy Creek, a tributary of the Teton River. The period of use would be from April 15 to October 15, inclusive, of each year. The diversion would be made by means of a pump located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 36, Township 26 North, Range 4 West, for use on 320 acres in the W $\frac{1}{2}$ of Section 1 and 40 acres in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 12, Township 25 North, Range 4 West, all in Teton County, Montana.

The pertinent portions of the Application were published in the Choteau Acantha, a newspaper of general circulation in the area of the source, on December 22 and 29, 1983.

Eleven timely objections were filed to the Application. The Montana Department of State Lands (hereafter, "State Lands") objected to the Application on the basis that the Applicant's proposed point of diversion is on State-owned land, and that the Applicant "does not have any type of agreement or easement with the State allowing access or permission to install the diversion and conveyance facilities." State Lands also objected on the basis that livestock use below the diversion could be affected.

Danny L. Weist, lessee of the State land in question, objected on the same bases. He also stated that there is insufficient water in Muddy Creek, and a possible saline seep problem.

Separate objections were received from Allen Denzer, Terri Denzer, and Lyman and Darlene Denzer, all alleging that their points of diversion are downstream from Applicant's proposed point of diversion, that they are using the "river" to water more than 500 head of cattle, and that they are irrigating out of the Brady Irrigation Project.

Elizabeth Hawley, Aqua Fria Ranch, Ronald and Lyle Otness, and Depner Farms all objected to the Application on the grounds that the proposed irrigation would over-irrigate the Applicant's land and thereby adversely affect the Objectors' surrounding lands by causing and/or accelerating saline seep.

Danreuther Ranches, through Charles and Janet Danreuther, filed an untimely Objection to the Application on the basis that they do not feel there are unappropriated waters in the Teton River during the requested period of diversion. The Danreuther objection states that the Teton River dried up during the irrigation season in 1984, and the crops suffered.

Brady Irrigation Company objected to the Application on the basis of the "findings and court hearing data" on Application for Beneficial Water Use Permit No. 17123-410, for which a contested case hearing was held in March, 1979. The objection also states that Muddy Creek is a Court-adjudicated canal for Brady's water from Bynum Reservoir during the proposed period of diversion.

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The Teton Water Users Association objected to the Application on the basis that in past years there has not been enough water to satisfy the needs of the Association members.

On August 30, 1984, Aqua Fria Ranch, Inc. withdrew its objection to the Application, stating that it did not feel the proposed project would adversely affect Aqua Fria.

On June 6, 1985, the Department received a letter from Charles and Janet Danreuther which stated that they would be unable to attend the hearing in this matter, but that they still objected to the Application based on insufficient water. They enclosed two photographs purporting to show the Danreuther point of diversion on the Teton River in October, 1984: the photos show very little water in the riverbed.

EXHIBITS

The Applicant asked that all exhibits which had been offered and accepted at the hearing In the Matter of the Application for Change of Appropriation Water Right No. G40605-410 by Crumpled Horn be accepted into the record of the present matter. The exhibits which had been introduced at the hearing (held June 12, 1985, immediately preceding the hearing in the present matter) were:

Applicant's Exhibits 1-7 are filmcards containing microfiche reproductions of contour maps of Muddy Creek. These were introduced at the Change hearing on G40605-410 to show that the Applicant's proposed impoundment would, for the most part, stay within the creek channel of Muddy Creek. Since this issue is irrelevant in the context of Applicant's proposed new use, these

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exhibits are accepted into the record in the present matter for the limited purpose of showing the credibility of Applicant's proposed appropriation plan.

Applicant's Exhibit 1A is a letter from the State of Montana Secretary of State's office, signed by Larry Akey, Executive Assistant. The letter is addressed to Dr. Leslie Chalmers and states that Mr. Akey has discussed the Applicant's proposed irrigation dam with Kellv Blake at the Department of State Lands and that Mr. Blake will, at the Applicant's request, "provide a statement that the Board of Land Commissioners generally provides easements on state lands for projects such as the one you propose. I hope this will be enough to show . . . the ability to acquire the needed easements, at least across State lands . . ." (Letter dated February 28, 1983.)

Applicant's Exhibit 2B is a May 15, 1981 letter from the Montana Department of State Lands to Danny L. Weist, referencing State Lease No. 2130. The letter authorizes the entry of Leslie Chalmers onto the State land for the purpose of a survey. The letter states that the action does not include the authority to construct the proposed reservoir; that the Applicant will be required to submit an application to the Land Board for an easement, and that compensation must be made for any "leasehold damages suffered as a result of Mr. Chalmer's action." (May 15, 1981 letter, signed by Wilbur Erbe, Administrator of the Land Administration Division.)

Applicant's Exhibits 1 through 7 and 1A and 2B were accepted into the record without objection.

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Applicant also offered an exhibit for admission into the record in this matter which had not been introduced at the Change hearing on G40605-410:

Applicant's Exhibit 8N is a photocopy of an aerial photo showing Muddy Creek as it runs through Sections 35 and 36, Township 26 North, Range 4 West, and marked with the location of Applicant's proposed point of diversion, pipeline, and place of use.

Applicants Exhibit 8N was accepted into the record for the limited purpose of showing the proposed point of diversion and place of use.

The Applicant also wanted to introduce into evidence a Ph.D. dissertation by Dr. Anne Stradley, entitled "Hydrology and Sub-Surface Geology of the Missouri and Madison Group, and Potential Water Use for Agriculture and Industry, Northwestern Montana Plains," University of Montana. This was objected to by State Lands on the basis of its being hearsay. The Hearing Examiner hereby sustains the objection. Although the Applicant was allowed to discuss aspects of soil salinity control at the hearing, and referred to expertise by soil scientists, the information was general in nature, and was being used by the Applicant as the basis for discussing irrigation practices on the proposed project. However, the introduction of a Ph.D. dissertation for the content thereof requires that the author of the document be available for cross-examination. See Montana Rules of Evidence, Rule 803 (18); Hert v. Newberry, 178 Mont. 355, 179 Mont. 160 (Petition for Rehearing denied); In the

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Matter of the Application for Beneficial Water Use Permit
No. 28744-G40A by Alan D. Evans, March 14, 1984 (Final Order
May 3, 1984).

Objector State Lands did not reintroduce any of the exhibits which it had offered at the Change hearing (on G40605-410) preceding the hearing in the present matter. However, the Hearings Examiner takes notice of Objectors' Exhibits A and B introduced at the Change hearing for the purpose of noting the current lessee of the State land in question (Obj. Exhibit A), and that the leased land is part of the School Trust lands granted to the State of Montana by United States of America Patent Number 1098299 (Obj. Exhibit B).

Objector Darlene Denzer offered one exhibit for admission into the record in this matter:

Objectors' Exhibit (Denzer) is a photocopy of a map showing the Denzer property, and is marked with the approximate location of the Applicant's proposed point of diversion.

Objectors' Exhibit (Denzer) was accepted into the record without objection.

PRELIMINARY MATTERS

Applicant objected to the Hearing Examiner offering to take notice, for purposes of expediting the hearing in the present matter, of objections discussed at the hearing In the Matter of the Application for Change of Appropriation Water Right No. G40605-410 by the Applicant. However, the Hearing Examiner limited the notice which would be taken to those portions of testimony which would apply to the present Application as well as

to the Change Application, and did not propose to take notice of testimony which was fact-specific only to the Change Application.

In the present matter, most of the parties who had objected to both Applications also testified at both hearings (or were not present for either hearing). Two exceptions were Objectors Elizabeth Hawley and Ronald Otness, who testified at the hearing on the Change Application, but not at the hearing in this matter (although Elizabeth Hawley was present at both hearings).

These two Objectors both testified as to their concerns about potential saline seep problems. Since these concerns were already part of the record, having been introduced through the parties' written objections to both Applications, the Applicant is not prejudiced by the Hearing Examiner noting these concerns in the record in the present matter.

The only other party who was present at the Change hearing and not at the hearing in this matter is Brady Irrigation Company; its testimony was specific to the Application for Change, and notice will not be taken thereof in the present matter.

The additional preliminary matter to be addressed is the receipt of an "ex parte communication" from an Objector in this matter. Objector Darlene Denzer sent a letter to the Hearings Examiner concerning a misstatement in her testimony at the hearing in this matter. This letter constitutes ex parte contact. Therefore, to comply with Administrative Rule of Montana 32.12.230, the Hearing Examiner notes this communication for the record:

Mrs. Denzer wrote to say that she had inadvertently given false testimony by saying that they had pumped water for their cattle from Muddy Creek in May 1974, when in fact they had not done so.

This letter will not be considered in the decision in this matter. No prejudice can accrue to any party because of the Hearing Examiner's receipt of the letter, since the content is not prejudicial to the Applicant.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. The Department has jurisdiction over the subject matter herein and the parties hereto, whether they appeared at the hearing or not.
2. The Application for Beneficial Water Use Permit in this matter was duly filed with the Department of Natural Resources and Conservation on September 30, 1983, at 2:10 p.m.
3. The pertinent portions of the Application were published in the Choteau Acantha, a newspaper of general circulation in the area of the source, on December 22 and 29, 1983.
4. The Applicant in this matter is Crumpled Horn, a Montana corporation.
5. David Chalmers, representing the Applicant, testified that the Applicant would like to divert waters leaking from the

Brady Ditch. Water would be diverted by means of a pumping station located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 36, Township 26 North, Range 4 West, and taken by means of a buried pipeline to center pivot sprinklers which would irrigate forage crops and small grains on 320 acres in the W $\frac{1}{2}$ of Section 1 and 40 acres in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 12, all in Township 25 North, Range 4 West, Teton County, Montana.

The proposed diversion rate is 2,520 gallons per minute, up to a volume of 950 acre-feet per year, for appropriation between April 15 and October 15 of each year.

6. David Chalmers testified that there has been water leaking through the Brady Irrigation Company diversion for all of his lifetime, and his father's lifetime. Mr. Chalmers testified that, to the best of his knowledge, Brady Irrigation Company has never made an effort to stop the waste. He testified that Brady Irrigation would not be affected by the proposed appropriation, since it would be taken out below their ditch, but that he believes Montana law won't allow Brady Irrigation to stop wasting if the wastewater has been appropriated by someone else.

David Chalmers further testified that, in dry years, the leakage from the Brady Ditch never reaches the county road one mile to the east. He stated that he realizes people downstream don't get enough water, but that the waste water doesn't help them since it doesn't go down the stream channel, but percolates into the streambed. He also stated that cattle could get stockwater by walking above the diversion or the creek.

Mr. Chalmers cited Mettler v. Ames Realty Co. (61 Mont. 152, 201 P. 702 (1921)) to support his position that it would be waste

to leave water in Muddy Creek for use by the downstream Objectors, when the water would not make it down to them anyway.

7. Mr. Chalmers testified that Crumpled Horn would like to construct a concrete structure across Muddy Creek for the purpose of impounding water. He stated that Crumpled Horn could run three pivots if it is allowed to impound water in a shallow pond, since it is able to irrigate a half-section of malting barley and wheat from a small collection basin which collects 600 gpm. He testified that the structure would not be used to store water.

In response to a clarification by Bob Larson, Mr. Chalmers testified that water would be impounded and pumped in the spring before the irrigation season, to fill the soil profile, and again in the fall to carry over the winter. He stated that the Applicant might be able to irrigate during the season if it wouldn't affect senior appropriators, but that it probably wouldn't be necessary to irrigate during the summer.

8. David Chalmers testified that the applied-for flow rate was based on pressure and volume requirements of the type of irrigation equipment the Applicant needs, but that current advances in equipment probably mean less flow is needed now. He testified that he does not know exactly how much pressure and volume will be needed, since "that's up to the people we're buying the system from," but that the Applicant could get enough flow by using a small catch basin, appropriating water for 24 hours, then pumping for 12 hours. He did not testify as to how many times this pattern would have to be repeated before the desired level of water in the soil was achieved.

9. Applicant's proposed impoundment, and a portion of the pipeline leading from it, are located on property held by the Montana Department of State Lands in trust for the School Trust Fund. (See Objectors' Exhibit B.) Mr. Chalmers stated that it is his understanding that it is the State's policy to grant easements (see Applicant's Exhibit 1A) and, alternatively, that federal law allows a person to enter in and appropriate on public lands, the federal law taking precedence over School Trust land provisions.

10. Mr. Chalmers testified that the Applicant is well-versed in irrigating methods which avoid saline seep problems, such as using tensiometric evaluation of soil moisture, continuous cropping, and sprinkler irrigation, and that they intend to irrigate so as to avoid saline seep.

Mr. Chalmers stated, in response to claims that the soils of the area are not suited to irrigation, that there will be no saline seep if the water does not penetrate below the root zone. Mr. Chalmers, quoting the Teton County Extension Agent, added that sprinkler irrigation is ideal for the area because it allows the irrigator to apply only the amount of water needed.

11. Lyle Manley, Counsel for the Department of State Lands, stated that the State land where Applicant's impoundment structure and pipeline would be located is on School Trust land, withdrawn from the public domain in 1889. Therefore, the Applicant is not entitled to trespass to obtain water, but must obtain an easement on the State property.

Mr. Manley stated that the Board of Land Commissioners has the discretion to decide such matters on a case-by-case basis:

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although it may be the usual policy to grant easements, it is not a certain thing. Not all applications are granted.

12. Mr. Manley stated that the State lands in question (Lease 2130) have a 1916 stockwater right which would be adversely affected by the Applicant's proposed appropriation.

13. Objector Danny Weist testified that he is the current lessee of the State land upon which the Applicant proposes to build the impoundment structure and pipeline. He testified that he objects to the Applicant's proposed appropriation because of possible problems connected with it, including saline seep, pipeline leakage, disturbance of the land, and problems with access if the pump site was to be fenced or if either party had to use gates.

14. Mr. Weist stated that the water the Applicant characterized as "leakage" is not being wasted, but is used by downstream appropriators. He testified that he uses Muddy Creek for stockwatering.

In response to a question by Mr. Chalmers as to why it should be a problem for the stock to use the area upstream from the proposed impoundment, Mr. Weist stated that the proposed impoundment is at the far west end of his lease property, and that the stock would be grazing the west end of the property too heavily as a result. He stated that currently the cattle use the full length of Muddy Creek on the property, and therefore the grazing is more widely distributed.

Mr. Weist added that the Brady Canal is a "mudhole" and his cattle would not go down into it, so that the stockwatering must be done out of Muddy Creek.

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15. Bill Reichelt, President of the Teton Water Users Association, testified that the Association objects to the Applicant's proposed appropriation because the water in Muddy Creek possibly may make it to the Teton River. He stated that even leakage such as that from Muddy Creek helps to keep the riverbed charged and make it easier to get water down to other appropriators on the Teton.

Mr. Reichelt stated that the fact Muddy Creek apparently goes dry above its junction with the Teton River does not mean water is not making it down that far, since it is possible that the water goes down into the gravel and flows underground. He stated that in some parts the Teton River itself goes underground for long stretches, and then reappears.

In response to questions, Mr. Reichelt testified that it is approximately 10 to 12 miles from Applicant's proposed point of diversion to the Teton River, and much further than that in "river miles."

16. Mr. Reichelt testified that the Teton Water Users usually have enough water, but that they have been short of water five out of the last twelve years. He stated that the Applicant should be allowed to appropriate water if the water doesn't reach the Teton River, but that it is not clear that the water doesn't get that far.

Mr. Reichelt added that he believes that the times when water might be available for appropriation are during the runoff in March and the spring rains during the first part of June.

17. Objector Darlene Denzer testified that the Denzers are watering about 500 head of cattle, and have a stockwatering right

filed in 1889. (The Denzers' SB76 Claim for Stockwater, Claim No. 154489, lists a priority date of 1891.) The Denzer property is located approximately four miles downstream from the Applicant's proposed point of diversion.

Mrs. Denzer testified that they use Muddy Creek and the Eyraud Lakes for stockwatering, but that the drought has limited the water available and nearly dried the lakes up in 1984. She stated that the Denzers have land south of Muddy Creek which can only be served by the creek, since there is no other source for stockwater. She added that there was a good flow in Muddy Creek previously in her six years on the property, but that recently there have only been waterholes in the creek out of which to obtain stockwater.

Mrs. Denzer testified that it is her understanding that the Brady Irrigation Company is required to let a certain amount of Muddy Creek water past the Brady Ditch to meet needs of downstream appropriators.

18. Ross Depner, representing Objector Depner Farms, Inc., testified that he is concerned that if the Applicant plans to recharge the soil to store water over the winter, the water is bound to go below the root zone and result in a saline seep problem.

In response to a question from Mr. Chalmers, Mr. Depner stated that Depner Farms currently has a saline seep problem which comes from "higher ground"; that Crumpled Horn probably is not the cause of the current problem because they haven't been irrigating, but that Crumpled Horn is on higher ground than

Depner Farms and could cause a saline problem with the proposed irrigation project. He testified that he is concerned about saline seep because so many of the factors are outside of the Applicant's control.

19. Marvin Cross, Engineering Analyst for the Havre Water Rights Bureau Field Office, testified that the Applicant's proposed irrigation is feasible, but that the question of whether or not saline seep would become a problem depends on the Applicant's management.

Mr. Cross testified that the soil in the area of the Applicant's proposed place of use is a silty clay loam which has a fairly good holding capacity and will hold water within the root zone of alfalfa. He stated that there should be no problem with "water banking" (referring to the Applicant's plan for storing water in the soil over the winter) as long as the Applicant keeps track of the water depth.

In response to a question, he added that a storm could cause saline seep to occur, but that the Applicant's use of water should not add to the problem unless the Applicant kept the soil profile full of water.

Mr. Cross testified that sprinkler irrigation and continuous cropping should help the saline seep problem, and that the center pivot irrigation system proposed by the Applicant is the best type to prevent saline seep. He stated that the Applicant appears to be taking precautions to prevent saline seep, but that some of the precautions, such as tensiometers, need a great deal of work and depend upon good management and frequent adjustment.

In response to a question of water availability, Mr. Cross stated that he does not have enough information to be able to say whether there is water available, since the only flow records are early (1912-1924) ones from gages far upstream.

20. A site visit was made immediately following the hearing in this matter. Observations made at the site indicate that the Brady Irrigation Ditch intersects the channel of Muddy Creek, and that the only water left in Muddy Creek below the Brady Ditch comes from leakage through the Ditch structure, at least during the Brady Irrigation Company's period of diversion.

There is no evidence in the record to indicate how much flow makes it past the Brady Ditch at times when the Brady Irrigation Company is not diverting from Muddy Creek or using it as a conveyance for Bynum Reservoir water.

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

3. Those Objectors who failed to appear at the hearing in this matter, in person or by representation, are in default.

Administrative Rule of Montana 36.12.208.

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4. The Department shall issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria are met:

(a) there are unappropriated waters in the source of supply:

(i) at times when the water can be put to the use proposed by the applicant,

(ii) in the amount the applicant seeks to appropriate; and

(iii) throughout the period during which the applicant seeks to appropriate the amount requested is available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

5. The use proposed by the Applicant, irrigation, is a beneficial use of water. See MCA § 85-2-102(2) (1985).

6. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

7. The proposed means of diversion, construction, and operation of the appropriation works are adequate. See Findings of Fact 5, 7, and 8.

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8. In the present matter, the recent case of Department of State Lands v. Pettibone (42 St. Rep. 869 (1985)) makes it clear that the Applicant cannot, as suggested, gain easements on the State School Trust lands involved by merely entering upon them (see Finding of Fact 9), but must reimburse the School Trust Fund for the full value of any loss or alienation of interest in the lands. Whether the Applicant can acquire the needed easements by payment of just compensation (see Constitution of Montana, Article IX, § 3(2); MCA § 85-2-414; MCA § 70-30-110) is a question which does not need to be answered in this forum. See also State ex rel. Galen v. District Court, 42 Mont. 105 (1910).

The issue of whether or not the Applicant can obtain an easement across the State lands where the proposed diversion site and pipeline are located is not one which needs to be resolved in order for the Department to be able to determine whether the Applicant has met the criteria for issuance of a permit.

The criteria, as set forth in MCA § 85-2-311, do not require, as a pre-condition to issuance of a permit, that the Applicant must prove it has a ditch or conveyance right for the water for which application has been made. See In the Matter of the Application for Beneficial Water Use Permit No. 55390-s76H by Heather J. Grayson, January 24, 1986 Proposal for Decision (Final Order, March 7, 1986).

However, the conditional nature of a permit ensures that the Applicant will not acquire a water right if it is unable to acquire the needed easements: if the Applicant is not able to divert and convey the water, the water will not be applied to beneficial use, and no water right will be perfected. As the

Department has previously stated, ". . . A water use permit merely licenses a prospective appropriator to initiate his intended appropriation. Any rights evidenced by such a permit remain inchoate or conditional in nature until such time as that Permittee applies the water . . . to beneficial use." In the Matter of the Application for Beneficial Water Use Permit No. 24821-s41E by Remi and Betty Jo Monforton, September 30, 1981 Proposal for Decision.

9. The Applicant has not provided substantial credible evidence that prior appropriators will not be adversely affected.

As discussed below, the Applicant has not shown that the proposed appropriation of leakage from the Brady Ditch would not cut off the stockwater supply for Objectors Weist and Denzer. Additionally, the proposed concrete impoundment structure would effectually capture a certain amount of water: in periods of low flow, water would be lost to downstream prior appropriators.

Even if a flow-through device was to be included in the impoundment structure, David Chalmers testified that the Applicant would not release water which would not make it down to the prior appropriators. This creates a water use priority system which is dependent on a judgment call by the junior appropriator. Whether or not this situation could be corrected by permit conditions so as to make the system administrable is not an issue which it is necessary to reach, since the Applicant has not provided substantial credible evidence on the issue of water availability.

10. The Applicant has not provided substantial credible evidence that there are unappropriated waters in the source of

supply, at times when the water can be put to the use proposed by the Applicant, in the amount the Applicant seeks to appropriate, and that the amount requested is available throughout the period during which the Applicant seeks to appropriate.

Since no accurate flow data is available for Muddy Creek (see Finding of Fact 19), the only evidence in the record concerning water availability is the testimony of the parties and witnesses at the hearing in this matter.

David Chalmers testified that there is water leaking through the Brady Irrigation Company diversion on Muddy Creek. (See Finding of Fact 6.) However, he did not provide any testimony or evidence as to the amount of leakage, or as to whether leakage occurs throughout the proposed periods of irrigation. The only other testimony suggesting that water is available came from William Reichelt, who believes water may be available in March and the first part of June. (See Finding of Fact 16.) However, Mr. Reichelt irrigates from the Teton River rather than Muddy Creek.

The Applicant might possibly be able to irrigate long enough in the spring to fill the soil profile, as proposed. (See Finding of Fact 7.) However, even assuming arguendo that there is enough water in Muddy Creek at the proper time to allow the Applicant to make beneficial use of the water (facts not on the record), the Applicant has not shown that there are waters in the source of supply which are unappropriated.

David Chalmers testified that the leakage did not make it down to the other users on Muddy Creek. (See Finding of Fact 6.) However, prior appropriators in this matter testified that they use the water for stockwatering. (See Findings of Fact 14, 17.)

The testimony makes it clear that whatever water is left in Muddy Creek downstream from the Brady Ditch is used for stockwatering. Even if water is only left in holes in Muddy Creek, as Objector Darlene Denzer testified has happened, it is probable that the leakage from Brady Ditch serves to keep the creekbed charged (as Mr. Reichelt testifies happens on the Teton River) and the waterholes open. Nothing in the record supports the Applicant's contention that the water from the Brady Ditch is not used by senior appropriators; rather, the testimony of the Objectors indicates that all of the water is being used. Therefore, the Applicant has not sustained its burden of proof on this issue.

While it is possible that there are unappropriated waters available during high flow years, there is no flow data or other evidence in the record to support a finding that there are unappropriated waters in the source of supply.

Therefore, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Application for Beneficial Water Use Permit No. 51353-s410 by Crumpled Horn is hereby denied.

DONE this 21st day of April, 1986.

Peggy A. Elting
Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620
(406) 444 - 6612

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620); the exceptions must be filed within 20 days after the proposal is served upon the party. M.C.A. § 2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed. Any adversely affected party has the right to present briefs and oral arguments before the Water Resources Administrator, but

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these requests must be made in writing within 20 days after service of the proposal upon the party. M.C.A. § 2-4-621(1). oral arguments held pursuant to such a request will be scheduled for the locale where the contested case hearing in this matter was held, unless the party asking for oral argument requests a different location at the time the exception is filed.

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AFFIDAVIT OF SERVICE
MAILING

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on April 21, 1986, she deposited in the United States first class mail, a PROPOSAL FOR DECISION, an order by the Department on the Application by CRUMPLED HORN, Application No. 51353-S410, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Crumpled Horn, Rt. 2, Choteau, MT 59422
2. Lyle Manley, Attorney, Montana Dept. of State Lands, Capitol Station, Helena, MT 59620
3. Teton Water Users Assoc., Box 222, Carter, MT 59420
4. Allen L. & Terri L. Denzer, Box 936, Conrad, MT 59425
5. Robert Woodahl, Attorney, 28 1st Street NW, P.O. Box 162, Choteau, MT 59422
6. Elizabeth M. Hawley, Choteau, MT 59422
7. Ronald W. & Lyle E. Otness, P.O. Box 726, Choteau, MT 59422
8. Danreuther Ranches, Charles & Janet Danreuther, Loma, MT 59460
9. Danny L. Weist, Rt. 2, Box 176, Choteau, MT 59422
10. Lyman R. & Darlene A. Denzer, Box 937, Conrad, MT 59425
11. Depner Farms, Inc., Rt. 2, Box 135, Choteau, MT 59422
12. Brady Irrigation District, Attn: Gordon Schlepp, Box 207, Brady, MT 59416
13. Bob Larson, Manager, Water Rights Bureau Field Office, Havre, MT (inter-departmental mail)
14. Gary Fritz, Administrator, Water Resources Division (hand deliver)
15. Peggy A. Elting, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Donna Elser

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 21ST day of April, 1986, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

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IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Judy Kohn
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 3-1-88

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